JOINT SUPPLEMENTAL REPLY DECLARATION OF TERRI MCMILLON, JOHN SIVORI, AND SHERRY LICHTENBERG

EXHIBIT 11

SWB
May 5, 2000

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POST-HEARING REPLY BRIEF OF

SOUTHWESTERN BELL TELEPHONE COMPANY

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PETITION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR ARBITRATION WITH MCI WORLDCOM COMMUNICATIONS, INC. PURSUANT TO SECTION 252(B)(1) OF THE FEDERAL TELECOMMUNICATIONS ACT OF 1996	§	PUBLIC UTILITY COMMISSION OF TEXAS

POST-HEARING REPLY BRIEF OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company ("SWBT") files this Post-Hearing Reply Brief to respond to the post-hearing brief of MCI WorldCom, Inc. ("MCIW"). This Reply will address MCIW's continuing attempt to subvert established T2A policy and certain additional discrete issues that require clarification.[1]

I. T2A – "So we don't know why we're having to relitigate this."[2]

This Commission has already, and recently, made fundamental decisions regarding matters that MCIW attempts to relitigate by collateral attack in the current arbitration. This panel should follow the Commission's lead, acknowledge and apply those prior decisions and reject MCIW's collateral attack. Application of the Project 16251 orders as written would serve the interest of settled policy in a telecommunications industry that has more than enough new questions to determine without revisiting already determined matters. If, on the other hand, MCIW is permitted to put fundamental T2A provisions in play despite those prior orders, then T2A will become nothing more than an illusory milestone with apparent policy decisions being revisited ad hoc in every arbitration. Perversely, any decision by this panel that failed to acknowledge and affirm those prior decisions would not only discourage acceptance

[1] SWBT submits that the remaining issues are already adequately briefed. SWBT disagrees with MCIW's filing of an additional unilateral DPL post-hearing, but in the interest of narrowing the scope of these disputed issues, will continue to work on these issues and will notify the arbitrators of any issues that the parties succeed in resolving. SWBT anticipates a joint status report with MCIW by Friday, May 12. As discussed at the hearing, the issues remain pending for decision unless the parties jointly notify the arbitrators the matter has been resolved.

[2] Testimony of Don Price, Hearing Transcript ("Tr.") at 391, relating specifically to Docket No. 18117 but deemed by SWBT to be applicable in concept to T2A as well.

and reliance on Commission policy decisions, such as that of the 75 CLECs that have relied upon the Commission's threshold orders and opted into T2A, but would also reward companies such as MCIW that sought its own, separate, uniquely favorable version of what was supposed to be a uniform agreement.

The Commission's listing of filings in Docket No. 16251 runs over **70** pages and includes over **2100** entries. One of the most extensively briefed issues was the MFN procedure for CLECs to adopt all or portions of the T2A. As these voluminous filings demonstrate, MCIW's arguments here merely recapitulate arguments it forcefully (and frequently) raised in 1999:

- "MCIW urges the Commission to conclude that a CLEC may opt into the PIA or any provision of the PIA, . . ., without having forced upon it the General Terms and Conditions of the PIA."[3]
- "MCIW or any other CLEC should have the ability to 'take' only those provisions of the PIA under which SWBT agrees to combine UNEs for a CLEC and incorporate such provision(s) into its existing interconnection agreement."[4]
- The T2A one year term is "an arbitrary deadline" that is "particularly unreasonable if SWBT fails to obtain Section 271 approval."[5]

MCIW recognized during the T2A development that the T2A provisions would not allow the kind of adoption process MCIW now urges and presented that issue for decision in that proceeding. "Under SWBT's proposed MFN practice a CLEC is not able to elect discreet provisions of SWBT's proposed PIA."[6] Similarly, MCIW tried and lost its policy objective to exclude from the T2A any language setting out agreed "legitimately related" provisions. As Judge Farroba pointed out, "it is to everyone's

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[3] Texas Public Utility Commission Project No. 16251 ("Project 16251"), Comments of MCI WorldCom on SWBT Proposed Interconnection Agreement General Terms and Conditions at 4 (June 24, 1999).

[4] *Id.*

[5] Project 16251, MCI WorldCom's Comments on Southwestern Bell Telephone Company's MFN Policy, Proposed Interconnection Agreement, and Proposed Collocation Tariffs at 8 (May 28, 1999)("*MCIW Comments*"). MCIW's 77-page *Comments* sets forth at length virtually every argument and concern MCIW now raises in its DPL positions and is a useful marker of the contentions already raised and addressed by the Commission. MCIW's MFN argument was also extensively argued by Messrs. Wakefield and Herrera during the T2A work sessions. *See, e.g.,* Project 16251, Transcript of Work Session at 488 *et seq.* (June 10, 1999).

[6] *MCIW Comments* at 13-14.

benefit to get some sort of clarity here on what is considered and is not considered legitimately related to avoid excess need to have to arbitrate that issue later on."[7]

Ultimately, MCIW's arguments on MFN and legitimately related terms were rejected by this Commission, based upon an exhaustive record. A record that, due to the time and resources available to the many participants, was much more complete than the two parties to this instant proceeding could hope to generate. That MCIW would now seek to re-try the T2A issues is predictable, and predictability is what this Panel should ensure by enforcing principles of *res judicata* and collateral estoppel. Otherwise, Commission decisions will come to be regarded as temporary inconveniences to be unraveled at the next proceeding, rather than providing firm foundations for policy guidance and business decisions for the telecommunications industry.

MCIW seems most concerned with the term of the T2A, but the term provision was a critical part of the Memorandum of Understanding[8] from which the T2A derives. The term and its effect were clearly recognized by the Commission. "The PIA is effective for one year, initially. Once SWBT receives approval under § 271, the PIA can be extended for an additional three years. If SWBT does not receive § 271 approval from the FCC in this calendar year, then the PIA is allowed to expire on its one-year anniversary, and CLECs may seek arbitration under the usual FTA provisions."[9] That MCIW now faces the possibility of a limited term, pending FCC § 271 approval, is simply the result of MCIW's unorthodox attempt to avoid the proper MFN procedure.[10]

Except as agreed by SWBT on the many issues that have been resolved, this panel should inform MCIW that it cannot receive substantive T2A provisions unless it opts in pursuant to Order 55 and accepts legitimately related terms as defined by Attachment 26.

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[7] Project No. 16251, Transcript of Work Session at 541 (June 10, 1999).

[8] *Memorandum of Understanding*, Project No. 16251, (April 26, 1999)("The Proposed Interconnection Agreement will be available to any requesting CLEC for a period of one (1) year from the date the Commission approves the Proposed Interconnection Agreement . . . .").

[9] *Memorandum from Chairman Pat Wood, III* to Commissioner Judy Walsh and Commissioner Brett Perlman 2 (April 28, 1999).

[10] Besides, even if the T2A is not extended beyond its initial term, the parties have a minimum of one hundred and thirty five days after expiration of the agreement to reach a successor agreement. See, T2A, para. 4.2.

SWBT's position is that the T2A, and T2A, language embody a unique and special blend of benefits that is not available except under the terms of the T2A, including Attachment 26, and the opt in procedures stated in Order 55 (Project 16251). Nor can the commitments or benefit be captured simply in a list of major special commitments such as UNE combos, new combinations of EELs, and provision of administrative 911 numbers. Rather, as explained by the Commission itself, the essential fabric of T2A is a package of benefits not otherwise available. As stated in this Commission's January 28, letter to the FCC. (Attachment "Evaluation of the Texas Public Utility Commission", page 3, Section 1, Executive Summary, Paragraph C.1, the first three sentences):

> A key issue raised in the public interest section of the April 1998 hearing was the ease of ability of a CLEC to get an interconnection agreement with the various Section 271 commitments. In response, SWBT incorporated the results of the collaborative process (including the MOU) and prior Texas Commission, FCC, and judicial decisions into a model interconnection agreement, the Proposed Interconnection Agreement (PIA). The Texas 1996-97 "mega-arbitration" interconnection agreement formed the basis of the PIA.

An overarching benefit is that the T2A contains the benefit to the CLEC from each and every Texas PUC arbitration award in one comprehensive document. Lacking the T2A, the CLECs would have been faced with the process of reviewing each CLEC contract resulting from arbitration and then exercising MFN rights across multiple documents to achieve the same result. As some of those previously arbitrated contracts have now been noticed for expiration, T2A has the effect of extending those results.

II. COMBINATION OF UNES

A. The Eighth Circuit Established The Law

The governing law with respect to new combinations of UNEs is contained in the Eight Circuit's *Iowa Utilities* decision,[11] Under that decision, ILECs such as SWBT have no legal obligation to assemble UNE combinations for requesting carriers.[12]

Neither CLECs nor the FCC sought review of the Eighth Circuit's vacatur of Rule 51.315(c)–(f),[13] thus the Supreme Court did not address that part of the rule. Accordingly, the Eighth Circuit's holding with respect to Rule 51.315(c)-(f) remains in effect, as recognized by this Commission.[14] In fact, the FCC itself has recognized that in light of *Iowa Utilities* there is currently no requirement that incumbent LECs provide new combinations under Sections 251 and 252 (*i.e.*, on a TELRIC basis). Consistent with this view, the FCC has asked the Eighth Circuit in the remand proceeding to "reinstate the Commission's network element combination rules" and thereby place a duty on ILECs to assemble previously uncombined network elements. *See* Brief for Respondents at 23, *Iowa Utilities Bd. v. Federal Communications Comm'n.* No. 96-3321, On Petition for Review of Orders of the Federal Communications Commission (8th Cir., filed Aug. 16, 1999). The FCC would not seek to establish such a duty if it believed that the obligation already existed.

The Supreme Court's reversal of the Eighth Circuit decision with respect to Rule 51.315(b) does not call into question the Eighth Circuit's vacatur of Rule 51.315(c)-(f). The Eighth Circuit's decision was based primarily on the understanding that the FCC could not require an incumbent LEC to provide access and interconnection superior in quality to that which the incumbent provided to itself. Indeed, in a brief filed with the

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[11] *See Iowa Utilities Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997) ("While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the [FCC], we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements.").

[12] Obviously, SWBT has agreed to provide UNE combinations for carriers who opt into T2A and will perform them as called for in other specific situations, such as compliance with Merger Conditions and UNE Remand, but SWBT is not willing to provide UNE combinations to MCIW except as provided under the terms of such prior determinations. MCIW has clearly chosen not to take the necessary steps to have UNE combinations under the T2A as a matter of right, i.e., MCIW has chosen not to opt into that agreement.

[13] 47 C.F.R. § 51.315(c)-(f).

Eighth Circuit in 1997, the FCC urged the court to treat Rule 51.315(b) as completely separate from Rule 51.315(c)-(f):

> The incumbents' briefs had complained that requiring ILECs to make changes to their networks or to combine elements that "are not ordinarily combined in the incumbent's network would forcibly conscript incumbents' personnel . . . into the service of competitors." The Court's response that ILECs cannot be required "to do all of the work" and that requesting carriers must "combine the unbundled elements themselves" was simply a restatement of its conclusion in striking down the related rule requiring ILECs to provide "superior" network elements: "[S]ubsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network – not to a yet unbuilt superior one." Prohibiting an ILEC from ripping apart network elements that already are combined in its "existing network" for the sole purpose of increasing its competitors' costs presents no conflict with this rationale.

Response of Federal Respondents to Petitions for Rehearing 9 (8th Cir., Oct. 1, 1997) (emphasis in original). As the FCC suggests, a rule prohibiting the separation of existing elements is distinctly different from a rule affirmatively requiring access to elements or combinations that are not already provided in the incumbent's network. The Supreme Court's rationale for resurrecting the existing-combinations rule – that incumbents should not be able to "impose wasteful reconnection costs on new entrants" – is simply inapplicable to new-combination rules.[15] Therefore, the Eighth Circuit's decision vacation of the new-combination rules is controlling.

The Ninth Circuit, however, has adopted the novel view that what the Eighth Circuit held to be contrary to the Act – requiring incumbents to create new combinations – nonetheless can be ordered by a state agency applying the Act. *See US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999); *see also MCI Telecommunications Corp. v. U.S. West Communications,* No. 98-35819, 2000 U.S. App. LEXIS 3139 (Mar. 2, 2000). But the Eighth Circuit's review of the FCC's order was undertaken pursuant to the exclusive jurisdiction provisions of the Hobbs Act. *See* 28

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[14] Evaluation of the Public Utility Commission of Texas, Application of SBC Communications, Inc., et al. For Provision of In-Region, InterLATA Services in Texas at 3, CC Docket 00-4 (FCC filed Jan. 31, 2000).

[15] *See Iowa Utilities*, 119 S. Ct. at 737.

U.S.C. § § 2341-2351.[16] This process gave the Eighth Circuit, and only the Eighth Circuit, jurisdiction over challenges to and defenses of the FCC's rules. *See* 28 U.S.C. § 2349(a) (granting the court of appeals reviewing an agency order "exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency"); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999) (stating that the Eighth Circuit "is now the sole forum for addressing challenging to the FCC's rules").

Acting pursuant to its exclusive jurisdiction, the Eighth Circuit vacated the "new combinations" rules in question as contrary to the Telecommunications Act. As a matter of federal law, those rules have not been reinstated, and cannot be reinstated, by the Ninth Circuit. Thus, unless the Eighth Circuit determines on remand that the rules in question should be resurrected, the FCC cannot enforce those rules, regardless what the Ninth Circuit says. *Cf. Federal Communications Comm'n v. ITT World Communications, Inc.*, 466 U.S. 463, 468,104 S. Ct. 1936, 1939 (1984) (noting that a party cannot evade the exclusive jurisdiction for review of FCC orders by requesting that another court enjoin the action that results from the agency's order).

Nor is it appropriate to conclude, as the Ninth Circuit did, that while the FCC's new-combination rule might be vacated, state commissions may nevertheless require incumbent LECs to assemble UNE combinations for requesting carriers. The purpose of the Hobbs Act and the consolidation procedure set forth in 28 USC § 2112 is to ensure uniformity on a national basis. *See, generally, GTE South*, 199 F.3d at 743 ("This consolidation procedure for review of agency orders is in place to avoid confusion and duplication by the courts and to prevent unseemly conflicts that could result should sister circuits take the initiative and issue conflicting decisions."). Yet the Ninth Circuit's approach mistakenly ignores these federal laws by stating that a state commission can interpret a federal statute to require the very action the Eighth Circuit held to be contrary to federal law.

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[16] The challenges to the FCC's rules were originally brought in virtually every circuit and were then consolidated in the Eighth Circuit for a single, national decision pursuant to 28 U.S.C. § 2112(a)(3). *See Iowa Utilities Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996). ("These cases have been consolidated in this circuit by the September 11, 1996 order of the Judicial Panel was Multidistrict Litigation, Docket No. RTC-31, pursuant to Rule 24 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation.*").

For these reasons, the Eighth Circuit's vacatur of Rule 51.315(c)-(f) controls this proceeding, and the Commission is bound by the Eighth Circuit precedent.

B. This Panel Should Reject MCIW's New UNE Language. (DPL Issue 122)

To accommodate MCIW's requests for UNE combinations, during the interconnection agreement negotiations, SWBT offered the provisions of Appendix C to the SBC – Ameritech Merger Conditions Order.[17] MCIW made no response to the Appendix language during negotiations or in its DPL comments. As a procedural matter MCIW should not now be allowed to propose new provisions not discussed during negotiations or at the hearing. *See, e.g., GTE South, Inc. v. Morrison*, 6 F. Supp.2d 517, 530 (E.D. Va. 1998), *aff'd*, 199 F.3d 753 (4th Cir. 1999).

Additionally, MCIW's premise is inaccurate. MCIW claims to offer language that comports with the Merger Conditions Order; instead MCIW's proposal actually is a "wish list," that does not address or include numerous terms of the Appendix. For example, MCIW seeks an across the board 25% discount; but the actual provision of the Appendix (para. 46.d) quotes a promotional discount for "unbundled analog local loops used in the provision of residential telephone service." Moreover, the promotion is qualified further by express conditions set forth in other sub-parts of paragraph 46.

This Panel should reject MCIW's attempt to re-initiate the UNE negotiation with this new proposal. SWBT submits that its proposed language, as discussed above, accurately reflects the controlling rulings of the Eighth Circuit. Alternatively, the language of paragraphs 45 and 46 of the Merger Appendix should be included in the new agreement in their entirety.

[17] The Appendix is a detailed document that describes "Unbundled Loop Discount" in a three-page section, attached hereto as Appendix "A." Over seventy Texas CLEC's have adopted the Appendix language.

C. SWBT Should Not Be Required Combine Elements to Form EELs (DPL Issue 122c)

SWBT submits that, except for very limited areas involving currently combined elements, such as conversion of special access circuits to UNEs, SWBT is not required and cannot properly be required to provide a loop transport combination. SWBT encourages the arbitrators to read this portion of MCIW's brief with great care and skepticism.

MCIW makes a blanket statement that SWBT has an obligation to provide a UNE combination of loop and transport commonly known as EELs, then quotes segments of Paragraph 480 from the UNE Remand Order and follows that with a paragraph of sentences that, unless read critically and carefully, could lead one to the conclusion that SWBT has an obligation to combine loop and transport elements as a UNE even if not currently combined in the network.[18] A reading of the omitted provisions of Paragraph 480 disproves MCIW's position.

The following quotation starts at the same place in Paragraph 480 of the UNE Remand Order as did the MCIW quotation, but then restores the language omitted by MCIW from the middle of that quotation (indicated by bold type as presented here):

> [T]o the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 315(b) require the incumbent to provide such elements to requesting carriers in combined form. **Thus, although in this Order, we neither define the EEL as a separate unbundled network element nor interpret rule 51.315(b) as requiring incumbents to combine unbundled network elements that are "ordinarily combined," we note that in specific circumstances, the incumbent is presently obligated to provide access to the EEL.** In particular, the incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs. Moreover, requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices.[19]

MCIW thus misstates the FCC's position. Indeed, it is precisely because rule 315(c) (which required ILECs to affirmatively combine UNEs for requesting carriers) has

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[18] MCIW Brief, at pp. 9-10.

[19] UNE Remand Order, para. 480.

been vacated that the FCC, in the UNE Remand Order, squarely *refused* to require ILECs to provide unbundled EELs to requesting carriers. The Eighth Circuit decision remains the law on "re-bundling," as discussed above.

SWBT provides EELs within the T2A, but MCIW must properly adopt all or part of the T2A using the procedures of Order 55 of Project No. 16251 to obtain these combined facilities. SWBT has also offered access to existing EELS in the 13-State Agreement given to MCIW. The procedures and requirements for such access are set out at SWBT's CLEC website and in an *Ex Parte* letter[20] filed with the FCC. Far from being "onerous" as MCIW argues, these procedures and requirements have been expressly cited with approval by the FCC.[21] As described below, a CLEC must certify that the facility provides a "significant amount of local exchange service," and the CLEC must follow the usual service order procedures for obtaining UNEs. [22]

While the FCC did not define "significant," it did state that the threshold levels of traffic proposed by Bell Atlantic and others in the *Ex Parte Letter* filed in the UNE remand docket would be an appropriate means of determining whether the amount of local exchange service was "significant." These FCC-endorsed thresholds should apply to any requests for EELs by MCIW.

As a matter of law, the service that MCIW provides to ISPs is not and cannot be local exchange service. The FCC has determined that the service LECs provide to ISPs is *exchange access service,*[23] not local exchange service. Moreover, the FCC specifically stated in the Supplemental Order that it was deferring to another proceeding the question "whether IXCs may employ unbundled network elements solely to provide exchange access service."[2425]

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[20] Ex Parte Letter from Susanne Guyer, Bell Atlantic to the FCC (Sept. 2, 1999)(Attached hereto as Appendix B).

[21] Supplemental Order, 3 n.9.

[22] *Id.* para. 5.

[23] *See, e.g.,* In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Dockets 98-147 *et al.*, Order on Remand, para. 35 (Dec. 23, 1999)("we conclude that the service provided by the local exchange carrier to the ISP is ordinarily exchange access service"); In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket 98-79, para. 21 (rel. Oct. 30, 1998)("The Commission traditionally has characterized the link from an end user to an [ISP] as an interstate service.").

[24] Supplemental Order, para. 4.

Yet if MCIW could convert a special access service used to serve an ISP to a loop/transport UNE combination, it would by definition be "employ[ing] unbundled network elements *solely* to provide exchange access service," in direct violation of the Supplemental Order.[26] This Panel should make clear that MCIW cannot recharacterize service to ISPs as local exchange service when making self-certifications to convert special access services to loop/transport UNE combinations.

III. POI - MCIW MUST ACCEPT ITS FAIR SHARE OF INTERCONNECTION COSTS

In its initial Brief, MCIW grudgingly agrees to provide a Point of Interconnection in every local exchange area in which it has customers. But MCIW's proposal does not address the inequities that may result from dispersed traffic patterns, and its "logical trunking" proposal sidesteps the problem. Properly understood, MCIW's "logical" trunking is nothing more than smoke and mirrors to hide the fact that some carrier must have trunks and facilities to carry MCIW's traffic and that MCIW wants the massively disproportionate cost burden to be on SWBT, even though MCIW obtains a mutual benefit from the arrangements.

The starting point for analysis is the agreement that the parties should share physical interconnection facilities costs. Equal sharing is illustrated by the architecture shown in SWBT Exhibit 11; each party bears an equal cost for its fiber path and associated electronics.

> In fact, because both sides provide half of the fiber and both sides provide half of the electronics that is at the end of

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[25] MCIW's reliance on Waller Creek to the effect that it "fills any hole that the FCC may have left" is misplaced. (MCIW Brief, p. 12) The FCC defined related issues for further consideration, including specifically whether CLECs can misapply UNEs to erode access revenues. Waller Creek addressed use of UNEs but did not address the establishment, definition or availability of these facilities as a newly combined UNE. Further, the Waller Creek decision is subject to a pending appeal that calls into question the propriety of access over UNEs.

[26] The issue of the treatment of ISP *traffic* as local exchange traffic for purposes of reciprocal compensation is entirely distinct from (and thus irrelevant to) the issue of whether a service that, as a matter of federal law, is exchange access service, can be recharacterized as local exchange service for purposes of self-certification. Although the FCC has stated that ISP traffic might sometimes be treated as local in a specific context, that fact "does not transform the nature of traffic routed to [ISPs]," and ISPs "in fact use interstate access service." In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket 98-79, ¶ 21 (rel. Oct. 30, 1998) ("The Commission traditionally has characterized the link from an end user to an [ISP] as an interstate access service.").

those fibers in their own ends, then, yes, I consider that an equitable way to join those two networks.[27]

The problem arises when traffic increasingly comes from end offices or a tandem switch not directly connected to an MCIW facility. SWBT Exhibit 12 illustrates this architecture. If traffic primarily comes from the northern (upper) end offices, SWBT bears an unfair burden of facilities costs to the northern switch and to the end offices. And this diagram does not show the full disparity. The single POI may be very short, and low cost, while the distances to other switches and end offices may be significant. It is fair in this situation for MCIW to share in physical facilities cost when traffic levels dictate. The language discussed at the hearing and set forth in SWBT's initial brief accomplishes this goal.

MCIW's "logical trunking" has nothing to do with sharing physical facilities cost. As Mr. Sigle hinted, his idea of a "logical trunk" is different from a physical trunk. A logical trunk "is something that rides on transmission facilities, but it's separate from those transmission facilities."[28] What MCIW proposes is to handle its traffic increases by designating an existing physical trunk as a dedicated, logical facility that will serve only MCIW traffic. MCIW is not willing to contribute toward the cost of that physical trunk, on which it intends to "logically" ride.[29] SWBT's proposed language fairly allocates the capital cost of necessary physical facilities linking the two carriers.

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[27] Tr. at 39-40. (Testimony of Andrew Sigle).

[28] Tr. at 123. (Testimony of Andrew Sigle). *See* SWBT Exh. 6 (Jayroe Testimony) at 14-15.

[29] MCIW's suggestion that SWBT could recoup its losses through reciprocal transportation charges ignores the disparity in call terminations that actually creates a reciprocal compensation windfall for MCIW. *See* Tr. at 59-60. (Testimony of Andrew Sigle).

IV. SPECIFIC DPL ISSUES

A. Optical Loops (DPL Issue No. 29)

SWBT has explained in its initial brief that the absence of an unbundled Optical Loop does not impair the ability of a CLEC to provide service, because, as the FCC has recognized, the CLEC could provide its own Optical Loop by using dark fiber (UNE or otherwise) and purchasing readily available electronics. MCIW's witness Price asserted that it was not that simple because there were electronics at the SWBT end as well as the customer end. There are still electronics that could be obtained by the CLEC; the only additional matter is that they would have to make arrangements to install this.

Competitors are not impaired without access to optical loops. The necessary electronics equipment is readily "available on the open market at comparable prices to incumbents and requesting carriers alike."[30] As pointed out in SWBT's initial brief and testimony, Optical loops would seem to fail to satisfy the "impair" standard of Section 251(d)(2); in any event an impairment analysis must be done prior to any properly considered determination of whether such equipment must be offered as an unbundled network element.

B. XDSL Technology (DPL Issue 135a)

MCIW does not discuss the merits of this issue, it just asserts that the final decision in Docket Nos. 20226 and 20272 should apply to this agreement and that this Commission has already found that the corresponding T2A language is "FTA complaint."[31]

The language proposed by MCIW was in T2A language. Their position is unclear now. If they want either of the agreements resulting from Docket Nos. 20226 or 20272, they could MFN into those agreements. As to the T2A language, if they want the benefit of those provisions they are available as a matter of right if they opt into them under Order No. 55. The xDSL provisions at issue were approved by this Commission as part of T2A and were made available under the terms for obtaining that

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[30] UNE Remand Order Id. at ¶ 308.

[31] MCIW Brief at 54.

agreement. SWBT is not willing to offer those special provisions outside of T2A and MCIW does not argue that they have been determined to be required by FTA. SWBT also questions the meaningfulness for this arbitration of the MCIW assertion that this Commission has already found that the corresponding T2A language is "FTA compliant."[32]

Ironically, this is another instance in which MCIW invites the arbitrators to rely upon MCIW's loose characterization of authorizing orders when that characterization is inconsistent with the express terms of the order and MCIW seeks to ignore other portions of the order. Order No. 55 approved T2A as follows:

> This Order approves the Texas 271 Agreement (T2A), as modified herein, and finds that it is a contract that complies with Section 271(c) of the Federal Telecommunications Act of 1996 (FTA) when executed pursuant to FTA . . .[33]

Under the express terms of Order No. 55, the determination of this Commission was that T2A was a contract that complied with Section 271(c) when executed pursuant to FTA. First, this determination was made specifically in a Section 271(c) context, and not, for example, in a general Section 252 context. Second, the determination was made for the "contract," presumably as a whole, not as to particular language standing alone in another agreement or context. Third, the same Order specifically defined the procedures for a CLEC to "accept the terms of the T2A" or to "opt into less than the full T2A."[34] It simply does not follow that MCIW can invoke this Commission's approval of T2A and at the same time take that approval out of the context in which it occurred, unilaterally select isolated language out of the contract in which it was considered and ignore the procedures by which this Commission expressly defined the availability of that which they had approved, including particularly acceptance of terms that were legitimately related to the attachment from which the "language" was drawn.

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[32] Id.

[33] Project No. 16251, Order No. 55, 1 (emphasis added, footnote omitted).

[34] Id. at 4.

C. DSL Rates (DPL Issue 135c)

The parties appear to agree that the arbitrators could appropriately determine that the rates for UNE loop qualification and cross connects as the Commission order in Docket Nos. 20226 and 20272 could be applied on an interim basis in this agreement, subject to true-up, until the Commission approves permanent rates based on SWBT's cost studies, at which time those rates would apply and would be used for true-up.

D. OS/DA (DPL Issue 125a, c)

MCIW's arguments confuse routing and signaling. SWBT provides customized routing; hence, there can be no question that OS/DA should no longer be designated as UNEs. MCIW is free to provide OS and DA services to its end users, and in fact, does so for its switch-based end users. With the technically sufficient customized routing solution available from SWBT for end users served by resold service or unbundled switch ports, MCIW also can route OS and/or DA calls to itself or the OS/DA provider of its choice.

As discussed during the arbitration, customized routing has long been available from SWBT in Texas, and MCIW was signatory to the stipulation in December 1996 that recognized SWBT's customized routing solution. Technically sufficient customized routing is available to CLECs that request it, and appropriate language is included in the T2A. MCIW did not oppose that customized routing language in work sessions to finalize the T2A and has not requested customized routing in Texas. Although MCIW may argue that customized routing is not available, SWBT is, in fact, providing customized routing to a CLEC customer in Texas and thus fulfills the obligation that makes OS/DA services and DA listings available on a nondiscriminatory basis under 251(b)(3) but not under the Section 251 (c)(3) unbundling requirement.

The FCC's UNE Remand Order recognizes that competition exists in the marketplace for wholesale OS and DA services and listing information for Directory Assistance services. In paragraph 464 of the UNE Remand Order, the FCC specifically states: "We do not find any impediments associated with self-provisioning OS/DA services that would delay a requesting carrier's entry into the local exchange or exchange access market. . . . We are unaware of any ongoing problems that create

material delays when competing carriers purchase OS/DA service from alternative providers."

While the FCC recognizes that customized routing is available under the current network structure, MCIW's position seems to be that SWBT must alter its network to accommodate every current or future type of signaling for any of various CLECs' networks. MCIW's assertion that SWBT has "outdated signaling protocol" is preposterous. SWBT's signaling protocols are standard in the industry, and it need not make various flavors of signaling protocols available to accommodate the nuances of CLECs' networks.

The FCC, in its UNE Remand Order notes that "a" customized routing solution must be available, not every solution that a CLEC might configure its network to require. In fact, Appendix C of the UNE Remand Order, which clarifies 47 C.F.R. § 51.319 for Specific Unbundling Requirements, specifically states that incumbent LECs must provide "customized routing or a compatible signaling protocol." Since SWBT provides customized routing which is being utilized today and MCIW recognized SWBT's valid customized routing solution in the December 1996 stipulation, it is disingenuous for MCIW to assert that it is SWBT's responsibility to adapt its network to whatever type of signaling MCIW requests. Rather, it is incumbent upon MCIW to make any signaling translations necessary to accept the industry-standard signaling that RBOCs utilize for switch signaling if MCIW wishes to route OS and DA calls away from the incumbent LEC.

E. White Pages (DPL Issues 111-114)

SWBT should not be required to deliver White Page directories to MCIW's facilities-based end user customers, since that responsibility rests with the facilities-based carrier, and SWBT makes White Pages available to the MCIW to fulfill that obligation. Furthermore, because SWBT does not perform this service for itself and contracts with a third-party for this service, it is unreasonable for SWBT to be forced to provide a service that MCIW can contract for with the same or different third-party vendor. Indeed, with the White Page directories that SWBT makes available to MCIW, MCIW could choose to perform the service in-house using its own storage facilities, personnel and distribution system (either by mail or through its installation technicians).

The settlement SWBT made with MCIW in 1999 was to resolve disputed contract language. SWBT's position has been and continues to be that a facilities-based provider has the responsibility to provide its end users with White Page directories, and SWBT makes those directories available to MCIW to fulfill its commitment to its end users. If ordered to provide a service to MCIW that it does not provide to itself, SWBT would propose market-based prices to recover the costs charged by the third-party vendor plus an administrative fee. The prices agreed to in the 1999 settlement are not appropriate since they were proposed to settle a dispute between the parties and not to provide a service on an on-going basis.[35]

F. Local Number Portability (DPL Issuelssue 127l)

MCI's opposition to this language update is unreasonable, because ubiquitous deployment of Local Number Portability is not the issue. SWBT's proposed language change simply recognizes that now that LNP is available somewhere, LIDB queries on a telephone number basis, not on an exchange basis. This is true now for a telephone number whether or not it is native in a switch that is LNP capable or not. LIDB queries on a telephone number basis and no longer on an exchange basis and SWBT seeks to update the contract language to reflect the change in the industry.

G. LIDB Editor Interface (DPL Issue 127p)

MCIW has inappropriately mixed LIDB concerns with PIC concerns – issues that are completely unrelated. InterLATA and intraLATA PIC information in LIDB is not used for any reason. PIC information resides in the dial tone switch and is completely unrelated to LIDB. While MCIW may wish to confuse the Editor Interface issue with its processing problems, the issues also are unrelated. SWBT's position remains: MCIW's access to the Editor Interface should be used only in emergencies to protect its end users from fraud and only when the Interactive Interface or Service Order Interface are unavailable.

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[35] As to the settlement, it obviously resolved a specific dispute under the existing contract. Mr. Beach acknowledged that, by its terms, the settlement agreement (1) was limited to the term of the interconnection agreement between the parties; (2) both parties reserved their rights to take contrary positions in the future; and (3) the settlement was not binding or precedential upon either party for future application. (Tr. at 464)

SWBT responded to MCIW's accusations regarding LIDB updates in a letter of May 3 to members of the Texas PUC.[36] Further clarification involves the differences in completed orders and posted orders. When an order completes, the end user's service is provisioned and the CLEC receives a Service Order Completion Notice. At service order completion, the end user's interLATA and intraLATA PIC are updated in the dial tone switch, where that information resides and is used by the industry. The number that identifies the end user's local service provider (the LEC or CLEC's Operating Company Number - OCN) and information used for validation of collect and third-party calls are updated in LIDB. PIC designation is a function of the dial tone switch, not LIDB. PIC information that does reside in LIDB currently serves no purpose and MCIW brings the PIC issue up in relation to LIDB inappropriately. LIDB's PIC fields were created for future use by entities that query and can receive Originating Line Number Screening (OLNS) information. PIC information in LIDB is currently superfluous. Again, PIC designation on each end user's line resides in the switch that provides the end user's dial tone. PIC changes flow to dial tone switches from the completed service orders, far upstream and completely independent from any PIC information in LIDB. No

[36] SWBT objects strenuously to the portion of MCIW's brief (p. 52) that recites fact based assertions based on material outside the record. MCIW gets the proper procedure backward by reciting the facts and then requesting leave to supplement the record. They should have briefed the facts only after and if leave was granted. SWBT would also suggest that leave to supplement should be carefully considered and generally granted only for matters that stand on their own and are not subject to reasonable dispute either as to accuracy and/or as to their materiality and proper application to the matter in dispute. SWBT submits that the "facts" urged by MCIW fail all of the tests; besides they do not appear critical to resolution of the relatively finite matter at issue in Issue 127p. MCIW's request to supplement the record is unclear as to exactly what is requested, but would presumably consist of a letter that MCIW has recently filed with the on the Commission. SWBT has responded to that letter and has taken issue with the factual basis of the letter and the implications of the MCIW letter. MCIW should not be allowed to supplement unless SWBT is also allowed to respond. SWBT would mention that the problems were not LIDB problems and that MCIW has not correctly described the situation. Given the timing issues, the fact that the supplements would probably just join issue on matters that were not tried and could not be resolved on this record, SWBT suggests the best approach would be to disregard the portion of the MCIW brief not supported by the record and to regard the conditional and incomplete request to supplement as of no effect (or to deny it). Although reluctant to do, SWBT will go about and respond to the outside of the record briefing at least enough to show that MCIW's assertion cannot simply be accepted at face value.

outside entity that queries SWBT's LIDB has asked for PIC information from SWBT's LIDB. MCIW, however, has the ability to verify the PIC information on their end users' records through the Interactive Interface that MCIW currently accesses, but SWBT is unaware that MCIW receives or use LIDB-derived PIC information from responses to LIDB queries. No outside entity does receive LIDB-derived PIC information.

Consistent with updates to LIDB records of SWBT's end users, other data on CLEC end user records are updated after the service order posts to SWBT's CRIS system. SWBT's May 3 response to the Texas PUC addressed the potential lag time between order completion and order posting. The potential lag time addressed was the result of work of service representatives in SWBT's LSC that created incomplete Toll File Guide orders. Incomplete Toll File Guide orders result in completed orders not posting, thus a portion of LIDB records were updated at completion, but not with the posted order. SWBT's commitment to the Texas PUC in its May 3 order will minimize any potential time lag between order completion and LIDB update. The 19 orders MCIW specified in their letter of April 24 have been processed. Also, SBC is proactively reviewing the entire base of MCIW's orders to ensure all orders have been correctly processed.

It must be noted that the critical information in LIDB (i.e. OCN and collect and third-number billed call validation information) are updated when the order completes (before posting) and the PIC information is updated in the dial tone switch. When the order posts to CRIS (after completion) Calling Name information (used in Caller ID services) ZIP code and other information that is not critical to the end user's local exchange service – as well as the PIC information that is not currently used for any purpose – is updated in LIDB. Certainly, changes to Calling Name and ZIP code information are infrequent to existing LIDB records and not critical to the end user's local exchange service. And as PIC information in LIDB is not used for any purpose, MCIW's concerns related to PIC updated in LIDB are unfounded.

H. Dedicated Transport (DPL 126)

This issue was discussed at the hearing and the dispute seems to be whether dedicated transport must be between ILEC and CLEC central offices and wire centers on whether such transport could go elsewhere. Although Mr. Price seemed to think the

decision could be read without regard to context, clearly the context and the terms of the decision discussed transport in terms of carriers' central offices or wire centers. In fact, the precise matter at issue in Docket No. 18117 was whether the FCC rules contemplated the provision of unbundled dedicated transport connecting offices at two different incumbent LECs rather than relating only to one LEC. (Docket No. 18117, Arbitration Award, March 23, 1998, P. 4) SWBT was unable to find any source in Docket No. 18117 for the MCIW citation at page 51 of their brief; rather the material quoted appears to be from an Order approving amendments to Interconnection Agreement in Docket Nos. 16285, 17587, and 17781, dated February 27, 1998; Appendix A, pp. 304. If that is the correct source, then the quoted language was followed with an explanation that:

> The Commission defers an interpretation of these provisions to Docket No. 18117 because a more complete record is being developed on this issue in that docket to determine whether UDT requirements should go beyond the FCC's minimum requirements.

SWBT's position is consistent with the Commission's decision in Docket No. 18117, which SWBT understands the decision to restrict dedicated transport to carriers' offices.

SWBT's proposed language is consistent with Docket No. 18117 and should be approved. MCIW should not receive the T2A language they propose initially because they have not opted into T2A and because the language includes the imprecise use of the word "premises." In context , the use of "premises" should probably be construed to refer to the carrier switches and wire centers as described earlier in the paragraph, without expanding or revising those terms (T2A, Attachment 6 UNE, para. 8.2.1.)., which as so ready would also be consistent with Docket 18117. MCIW should not be permitted to change to other proposed language beyond what has been negotiated or discussed previously unless the parties succeed in reaching agreement on that language

V. Conclusion

MCIW has repeatedly asserted in this proceeding that it cannot accept T2A as established by this Commission because of its unique business needs; those unique business needs were frequently asserted but remained mystical and undefined throughout this proceeding. Pretense aside, MCIW is seeking uniquely favorable interconnection arrangements vis-à-vis (1) SWBT as an ILEC, and (2) MCIW's competitors that would skew the competitive landscape well beyond any requirements or justification in applicable law, rule or regulatory decision. SWBT respectfully requests adoption of SWBT's positions in this arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gary L. Buckwalter, Senior Counsel for Southwestern Bell Telephone Company, certify that a true and correct copy of this document was served on all parties of record in this proceeding on May 5, 2000, in the following manner:

Via facsimile transmission, U.S. mail or hand delivery.